

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 61476-2-I
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
OLIVER LEONEL-CASTILLO,)	UNPUBLISHED OPINION
AKA LUIS ORTEGA-OLVERA,)	
)	
Respondent.)	FILED: June 1, 2009
)	

Leach, J. — In this case, we are asked to decide whether the trial court abused its discretion in dismissing the charge of methamphetamine possession against Oliver Leonel-Castillo when the prosecutor, who had a family obligation on the morning of trial, failed to appear at the time trial was scheduled to begin. The prosecutor had not requested permission to appear late in court or even successfully notified the court of his family obligation. Defense counsel also failed to accurately disclose her knowledge of the prosecutor's family obligation when directly asked by the trial court. Although presented with a difficult situation created by the improper actions of both counsel, the trial court abused its discretion by failing to consider any reasonable alternatives to dismissal and

to address whether the prosecutor's actions prejudiced Castillo.¹ We reverse and remand for reinstatement of the charge against Castillo.

Background

On January 6, 2007, Castillo was detained by Highline Hospital Security Officer Mohamed Al-Belletah for trespassing and later arrested by Tukwila Police Officer Donald Ames. During the arrest, Ames found suspected narcotics in Castillo's briefcase, which field-tested positive for methamphetamine.

On September 14, 2007, the King County Prosecutor charged Castillo with violation of the Uniform Controlled Substances Act (VUCSA), possession of methamphetamine, RCW 69.50.4013. Although a case scheduling hearing was originally set for October 10, 2007, Castillo obtained continuances of the hearing until November 14, 2007. On that day, the court set an omnibus hearing for January 11, 2008, and the trial for February 5, 2008, with the expiration date of February 11, 2008.

Castillo obtained continuances of the omnibus hearing until February 22, 2008, and of the trial until February 26, 2008, with the expiration date of March 27, 2008. At the omnibus hearing on February 22, 2008, the court noted that defense counsel had still not interviewed two witnesses, Ames and Al-Belletah, and ordered the interviews to be completed by the trial date of February 26,

¹ Because we reverse on this ground, we need not address the assignment of error regarding the trial court's denial of the State's motion for reconsideration.

2008. The prosecutor agreed to help defense counsel contact Ames and Al-Belletah. At that time, the prosecutor had been unable to locate Al-Belletah. The prosecutor was also unable to provide defense counsel a copy of the criminal laboratory report on the suspected methamphetamine because he had not yet received it. The court further noted that pretrial hearings were anticipated for Castillo's motion to suppress evidence and the State's motion to admit Castillo's custodial statements.

Later on February 22, the prosecutor contacted the Washington State Patrol Crime Laboratory about the report. Although this report was faxed to him the day before trial, the prosecutor did not notify or provide defense counsel with a copy of the report. The prosecutor also called the Tukwila Police Department to contact Ames and to ask a detective to help him locate Al-Belletah at a newly discovered address. Both calls were unsuccessful.

On February 25, 2008, the prosecutor was able to contact Ames, who agreed to call defense counsel. Ames also agreed to investigate the address for Al-Belletah and later reported that officers learned that Al-Belletah resided there but was not home at the time.

That afternoon, Castillo's case was assigned to a trial judge and scheduled to begin at 9:00 a.m. the next morning.² At 5:14 p.m., the prosecutor sent an e-mail to defense counsel and to the court, via King County's assigned e-mail address, stating that his grandfather had recently suffered a stroke and that, as the family's representative, he had to attend a 7:00 a.m. appointment regarding his grandfather's recent health issues. But the prosecutor stated, "I will try to be in court at/before our scheduled time, but I may not be able to be there until 9:30 or 10:00."

Defense counsel responded to this e-mail a half hour later, writing, "I have no problem with accommodating your family needs. . . . See you tomorrow after your other obligations are fulfilled." Because the court did not use its assigned e-mail address, it did not receive the prosecutor's e-mail.

Later that evening, defense counsel provided the court with a motion to suppress and a trial memorandum via e-mail.³ In the memorandum, defense counsel stated,

² Under King County Superior Court Local Criminal Rule (LCrR) 1.1, "It is presumed that the parties are ready for trial and will proceed to trial without recesses if a party does not notify the court that it will be seeking a continuance or recess at trial call." The rules further specifies: "At the trial call, the Chief Criminal Judge or Chief RJC Judge will ascertain whether counsel are ready and available for trial. The court should be advised at this time of any matters that will interfere with counsel's availability during any portion of the trial day." King County Superior Court Criminal Department Manual, Ch. 16, at 24, 25 (Feb. 2007), <http://www.metrokc.gov/kcsc>.

³ The order on omnibus hearing stated that the trial memorandum on the suppression motion was due on February 25, 2008.

Highline Security Officer, Mr. Al-Belletah, has not responded to defense requests for an interview. The reporting Tukwila Police Officer is Donald Ames. The defense investigator is Deb Scott. Officer Ames responded to Ms. Scott's initial fax but Ms. Scott has not been able to interview him despite follow-up efforts. At omnibus, the State indicated a willingness to assist in securing a defense interview.

Defense has not been provided an actual lab report at the writing of this trial memorandum.

The court bailiff noted that defense counsel's e-mail contained a vague reference to the prosecutor's family obligations, in which she stated that she wished that the prosecutor "had told us earlier of his family obligation."

On February 26, 2008, the bailiff sent an e-mail to both counsel at 8:16 a.m., inquiring about the prosecutor's family obligation and any conflicts with trial scheduling. Neither party responded to this e-mail.

At 9:05 a.m., Castillo, defense counsel, and a Spanish interpreter were present in court, but no one had appeared from the prosecutor's office. The bailiff called the prosecutor's office asking for the assigned prosecutor and was told that the office had been unable to reach or find him. About 9:15 a.m., defense counsel moved to dismiss, stating that she "was quite surprised—I did get an e-mail from [the prosecutor] talking about a family obligation, but he did not indicate what day that family obligation was." The court granted defense counsel's motion to dismiss:

I did review your trial memorandum in which you did indicate that [Al-Belletah] did not respond to the defense request for an interview, and . . . that there was a problem with [Ames] as well. And this is beyond omnibus time, and so as much as this court is

always reluctant to just simply dismiss cases, this has been extraordinary, unusual and the lack of contact from the State, as well as not having someone present today, in my view, merits the relief requested and so I will go ahead and dismiss the matter.

The court then asked defense counsel to draft the order:

What I'm also going to simply indicate on this order is that even on the morning of trial . . . witnesses have not been made available to you, either. I just think it is important to keep this part of the record. I have also indicated here . . . that no one from the Prosecutor's Office appeared even after being contacted by the Court.

Neither the court's oral ruling nor written order specifies the rule on which the dismissal was based.⁴

Later that day, the trial court filed a memorandum of the court. The memorandum stated that the assigned prosecutor had appeared later that morning with a copy of the e-mail he had sent to the court and defense counsel. The prosecutor was informed that the judge did not use the generic court address, which was clearly stated on the judge's web page. As a result, no member of the court had received the prosecutor's e-mail before trial.

On March 5, 2008, the State filed a motion to reconsider, supported by documents that included an affidavit by the prosecutor and the e-mails between the prosecutor and defense counsel. The trial court denied the motion.

Standard of Review

A trial court's decision to dismiss criminal charges is reviewed for abuse

⁴ Contrary to Castillo's contention, nothing in the record establishes that the dismissal was based on CrR 4.7.

of discretion.⁵

Discussion

The State contends that the trial court abused its discretion in dismissing the criminal charge against Castillo on two grounds. The State asserts that the trial court failed to consider reasonable alternatives to dismissal. Analyzing the trial court's dismissal under CrR 8.3(b), the State also argues that the court failed to address whether Castillo was prejudiced by the prosecutor's actions.

Whether the trial court's dismissal in this case is analyzed within or outside the limits of CrR 8.3(b), dismissal is an extraordinary remedy available only after the trial court considers intermediate and less drastic remedial steps.⁶ Under CrR 8.3(b), dismissal is available only when the court determines that there has been governmental misconduct or arbitrary action and prejudice to the rights of the accused.⁷ In State v. Koerber,⁸ this court applied both of these principles in holding that the trial court abused its discretion in dismissing a criminal charge without considering reasonable alternatives and that the trial court should not have dismissed the charge under CrR 8.3(b) since there was no

⁵ State v. Koerber, 85 Wn. App. 1, 3, 931 P.2d 904 (1996).

⁶ Koerber, 85 Wn. App. at 4. See also State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003) (stating that the trial court should have considered less extreme alternatives before ordering dismissal under CrR 8.3).

⁷ CrR 8.3(b) provides that in the furtherance of justice, the court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial."

⁸ 85 Wn. App. 1, 3, 931 P.2d 904 (1996).

finding of prejudice to the defendant.

In Koerber, the State discovered the night before trial that one of its witnesses was sick with the flu.⁹ The trial court found that witness's testimony was critical to the State's case, that the witness was unavailable, and that the State could not advise the court when the witness would be available.¹⁰ For these reasons, the trial court dismissed the VUCSA charge against Koerber, expressly stating that the dismissal was not in the interest of justice under CrR 8.3(b), but for "want of prosecution."¹¹ On appeal, this court reversed, holding that "[d]ismissal of a criminal case is a remedy of last resort, and a trial judge abuses discretion by ignoring intermediate remedial steps."¹² The Koerber court provided examples of reasonable alternatives the court could have considered, such as proceeding with trial to determine if the witness would be available in a reasonable time, granting a short continuance to let the State proceed if the witness became well enough to attend court, or allowing the State to procure the testimony in another acceptable manner.¹³ In failing to consider such alternatives, the court concluded that the trial judge abused his discretion.¹⁴

The Koerber court also analyzed whether dismissal would have been proper under CrR 8.3(b), despite the trial court's statement that its dismissal was

⁹ Koerber, 85 Wn. App. at 3.

¹⁰ Koerber, 85 Wn. App. at 3.

¹¹ Koerber, 85 Wn. App. at 3.

¹² Koerber, 85 Wn. App. at 4.

¹³ Koerber, 85 Wn. App. at 4 n.2.

¹⁴ Koerber, 85 Wn. App. at 4.

not based on that rule.¹⁵ Declaring that “[f]airness to the defendant underlies the purpose of CrR 8.3(b),” the court held that dismissal under CrR 8.3(b) was not warranted absent a finding of prejudice to the defendant, even if the State’s conduct amounted to misconduct or arbitrary action.¹⁶ The court noted that prejudice was only discussed when Koerber’s attorney told the court that Koerber would be prejudiced by a continuance because of his schedule of working nights and attending court in the day.¹⁷ The court responded that Koerber’s work schedule was not his concern, but that continuing the case would inconvenience the jury.¹⁸ In light of this brief exchange, the Koerber court held that the trial court abused its discretion because “the record does not establish that there was any prejudice to Koerber resulting from [the State’s] conduct.”¹⁹

Like the trial court in Koerber, the trial court here did not consider reasonable alternatives before dismissing the charge against Castillo. In its oral ruling and written order, the trial court only stated that it was basing its dismissal on the assigned prosecutor’s failure to (1) appear in court, (2) make witnesses available to the defense, and (3) provide defense counsel with a copy of the laboratory report. Nothing in the record shows that the court considered intermediate or less drastic remedial measures—which counsel for Castillo also

¹⁵ Koerber, 85 Wn. App. at 4-5.

¹⁶ Koerber, 85 Wn. App. at 5.

¹⁷ Koerber, 85 Wn. App. at 5.

¹⁸ Koerber, 85 Wn. App. at 5.

¹⁹ Koerber, 85 Wn. App. at 5.

conceded at oral argument—such as ordering a short recess to determine whether a valid excuse existed or whether the witnesses could be produced in time to allow trial within the speedy trial period, which was set to expire in approximately one month. The fact that Castillo was not in custody and his speedy trial expiration date was not imminent further supports our conclusion that, despite the prosecutor’s failure to request the trial court’s permission to appear late in court, the trial court abused its discretion when it failed to consider reasonable alternatives and readily ordered dismissal.²⁰

In addition, the trial court here, like the trial court in Koerber, did not address prejudice to Castillo. Although the court mentioned that the State had failed to make Ames and Al-Belletah available for pretrial interview and to provide a criminal laboratory report, the court did not explain how this prejudiced Castillo. Nor could counsel for Castillo offer any reasons at oral argument how Castillo would have been prejudiced by a short recess. Following Koerber, the trial court should not have dismissed the case under CrR 8.3(b) without finding prejudice to Castillo.

Castillo nonetheless claims that dismissal is justified under State v. Chichester,²¹ arguing that “if . . . the trial court had begun the trial in the

²⁰ See Wilson, 149 Wn.2d at 12 (reasoning that because a criminal defendant was not in custody and his speedy trial expiration was about one month away, the trial court should not have resorted to the extraordinary remedy of dismissal “until speedy trial expiration became an issue”).

²¹ 141 Wn. App. 446, 170 P.3d 583 (2007).

prosecutor's absence, the prosecution would have failed for lack of evidence." In that case, the trial court dismissed the criminal case against Chichester when the State declared on the day of trial that it was unready to proceed because the assigned prosecutor had another trial.²² This court affirmed the dismissal, reasoning that "because the State was not ready to proceed, the case would have necessarily failed for lack of evidence if the court had called it for trial."²³ But Chichester is distinguishable because the trial court there specifically considered reasonable alternatives, such as proceeding with the deputy prosecutor who had appeared at court, before ordering dismissal.²⁴ The State rejected all of the court's suggestions.²⁵ Here, although the bailiff attempted to contact the assigned prosecutor on the morning of trial, the court did not consider proceeding with another prosecutor or any other alternative before ordering dismissal. Moreover, unlike in Chichester, it is unclear from the record whether the State would have been unready to proceed, which was conceded by Castillo's counsel at oral argument.

Conclusion

²² Chichester, 141 Wn. App. at 451-52.

²³ Chichester, 141 Wn. App. at 459. In affirming, this court refused to analyze the dismissal under CrR 8.3(b), stating that "[w]e do not believe CrRLJ 8.3(b) is the controlling rule where the State comes to court on the date of trial unready to proceed after being unable to show good cause for a continuance." Chichester, 141 Wn. App. at 458.

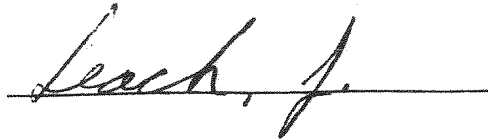
²⁴ Chichester, 141 Wn. App. at 451-52.

²⁵ Chichester, 141 Wn. App. at 451-52.

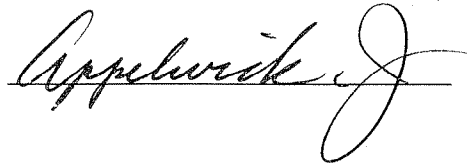
Despite the improper actions of both counsel, the trial court abused its discretion in dismissing the charge against Castillo without considering

reasonable alternatives. Dismissal under CrR 8.3(b) was also improper because there was no finding of prejudice to Castillo.

Reversed and remanded.

A handwritten signature in cursive script, reading "Leach, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, reading "Dwyer, A.C.J.", written over a horizontal line.A handwritten signature in cursive script, reading "Appelwick, J.", written over a horizontal line.